

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: MBAROUK, J.A., MWARIJA, J.A., And LILA, J.A.,)

CRIMINAL REFERENCE NO. 2 OF 2014

CHARLES JOHN MWANIKI NJOKAAPPLICANT

VERSUS

THE REPUBLICRESPONDENT

**(Application for reference from the decision of the Court of
Appeal of Tanzania
at Dar es Salaam)**

(KILEO, J.A)

dated 12th day of June, 2014

in

Criminal Application No. 20 of 2013

RULING OF THE COURT

7th & 20th February, 2017

LILA, J.A.:

By way of a letter addressed to the Registrar, Court of Appeal, this Court is moved under Rule 62(1) (a) of the Court of Appeal Rules, 2009 [herein to be referred to as the Rules] and Article 123(a) of the Constitution of the United Republic of Tanzania, to have his application formally determined by a single justice (Kileo, J.A) on 12th June, 2014 in Criminal Application No. 20 of 2013 be determined by the Court.

The background of the matter is straight forward. The applicant was convicted of the offence of Armed Robbery and was sentenced to

serve thirty (30) years imprisonment by the High Court of Tanzania sitting at Dar es Salaam. He unsuccessfully appealed to this Court in criminal appeal no. 48 of 2006. Dissatisfied with the decision delivered on 24th December 2009, he wished to lodge an application for review but was late. He thus filed application No.20 of 2013 for extension of time within which to lodge an application for review. The single justice (Kileo, J.A as she then was) dismissed the application after she was satisfied that the applicant had not, in his application, indicated the grounds he would rely upon in the application for review in the event he was granted extension of time to file application for review. Regarding the applicant's contention that he was late to apply for review because he was yet to be served with the copy of the decision of the Court, the learned single judge held that in review applications, the Court does not deal with the merits of a decision instead it addresses on the irregularities of a decision or proceedings which have caused injustice. She concluded that the applicant was thus obliged to state the irregularities he intended the Court to address in his application for review in the event his application for extension of time was granted. Dissatisfied with the decision of the single justice, the applicant filed the present reference.

When the matter was called on for hearing, the applicant appeared in person. He maintained that he was late to file his application for review because he was served with the copy of the Court's decision in Criminal Appeal No. 48 of 2006 late (on 2nd November, 2011) without which he could not apply for review. He, however, readily admitted that he did not apply to be supplied with the copy of this Court's decision at the time the judgment was delivered and also that he did not state, in his application for extension of time to file review, the grounds he would rely in the application for review in the event his application for extension of time to file review would have been granted. He further stated that, at the time he filed the application for extension of time to file application for review he already had a copy of the Court's decision. He also referred us to the affidavit by Peter Linus Msimbe, Assistant superintendent of Prison, which shows that he received the copy of judgment on 2nd November, 2011. He said, he believed that the sixty days time limit to file review would be counted from the date he received the copy of judgment.

Ms. Tumaini Mfikwa, learned Senior State Attorney, who appeared for the respondent/Republic attributed the applicant's delay

in applying for review to his sheer negligence and lack of due diligence. She argued that the applicant did not take necessary steps promptly to file review after the Court's decision was delivered. She accordingly urged us to dismiss the application.

We have given due consideration to the arguments by both sides.

The applicant's application that was before the single justice was in respect of an extension of time to file an application for review. The Court's powers to hear and determine applications of this nature is governed by Rule 10 of the Rules which requires the applicant to show good cause for the delay. The Court in **Bushfire Hassan Vs Latina Lucia Masaya**, Civil Application No. 3 of 2007 (unreported) in very certain terms spelt out that:-

"Delay, even a single day, has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken".

In view of the above position of the law, the applicant was obliged to account for each day of delay in filing application for review before the single justice when the application for extension of time was heard.

Besides the above requirement, as the applicant's application was for extension of time to file a review, he was bound to comply with the general requirements of filing applications under Rule 48 (1) of the Rules which stipulates the form of applications to the Court. That Rule states:-

" 48 (1) subject to the provisions of sub-rule (3) and to any other rule allowing informal application, every application to the Court shall be by notice of motion supported by affidavit. It shall cite the specific rule under which it is brought and state the ground for the relief sought". (emphasis supplied).

Based on the above quoted Rule, generally speaking, the applicant's application before the single justice ought to have stated the ground(s) for the relief sought.

However, as the application before the single justice was specifically for extending time within which to file review, then the applicant was also obliged to comply with the requirements of Rule 66(1) and (3) of the Rules which specifically govern applications for review. That Rule states:-

*66-(1) The Court may review its judgment or order, but **no application for review shall be entertained except on the following grounds***

- (a) the decision was based on a manifest error or on the face of the record resulting in the miscarriage of justice;*
- or*
- (b) a party was wrongly deprived of an opportunity to be heard;*
- (c) the Court's decision is a nullity; or*
- (d) the Court had no jurisdiction to entertain the case; or*
- (e) the judgment was procured illegally, of by fraud or perjury.*

(2).....(not relevant)

(3) The notice of motion for review shall, be filed within sixty days from the date of the judgment or order sought to be reviewed. It shall set out clearly the grounds for review."

(Emphasis is ours)

The Court dealing with a similar matter in the case of **Amiri Athumani vs The Republic**, Criminal Appeal No.6 of 2011 (unreported) stated:-

"Since the present applicant is applying for an extension of time to apply for a Review, the GOOD CAUSE under Rule 10 in my understanding means that he must put before this Court grounds of review, which are arguable or worth consideration by this Court when exercising its power of review under Rule 66 of the Court of Appeal Rules. In this regard, the learned State Attorney contended that the applicant has failed to manifest in his notice of motion any of the grounds for review enumerated under Rule 66 (1) of the Court of Appeal Rules, 2009 which shall vest the Review Court with any jurisdiction should his application for extension be granted".

It is indeed clear that both Rules [Rule 48(1) and 66 (1) and (3)] mandatorily require the applicant to state the grounds to be relied on in any application and where the application is specifically for review the grounds to be stated are as stipulated in rule 66(1)(a) to (e) of the Rules. It therefore goes without saying that in an application for extension of time to file a review, the applicant has to state which of those grounds he would rely on in his application for review in the event his application for extension of time to file review is granted.

Apart from the above it is also apparently clear that an application for review has to be lodged within sixty days from the date the decision sought to be reviewed is delivered not from the date of being supplied with the copy of judgment as contended by the applicant.

Having laid down the legal principles governing the present matter, we now turn to consider and determine the merits of the application.

The main issue for determination here is whether there are justifiable reasons to fault the decision by the single justice dismissing the applicant's application for extension of time to file a review against this Court's judgment in Criminal Appeal No. 48 of 2006.

As the record shows, the applicant's reasons for delay in filing a review are contained in his affidavit and that of Peter Linus Msimbe in support of his application.

Reading the contents of the affidavit closely, the only reason for delay relied on by the applicant is that he was supplied late with the copy of this Court's judgment. He contended that, he received the copy of judgment on 2nd November, 2011 while the decision was delivered on 24th December, 2009. As indicated above, the applicant admitted in Court that he did not apply to the Court to be supplied with the copy of the Judgment immediately after the judgment was delivered. It is our considered view that if the applicant was really dissatisfied with the decision and he intended to apply for review no doubt he would have had promptly applied to be supplied with a copy of the judgment. His failure to do so, as rightly argued by the learned

Senior State Attorney, amounts to lack of seriousness, lack of diligence and negligence. There is nothing showing that the applicant made any efforts to secure the copy of the decision from the Court. His contention that he was in prison and he could do nothing carries no water for appeals, notices of appeal and other correspondences reach the Court from prisoners who are in prison. He is to blame himself for the delay in being supplied with the copy of the Court's decision. He simply did not exercise due diligence to obtain a copy of the decision. Negligence and or lack of diligence is not sufficient cause for extension of time. This Court in **Paul Martin vs Bertha Anderson**, Civil Application No.7 of 2005 (unreported) categorically held that inaction and lack of diligence on the part of the applicant are factors which do not constitute sufficient reason to warrant the Court's exercise of its discretionary powers to extend the time sought in the application.

The single justice, as demonstrated above, dismissed the applicant's application, because the applicant did not state the grounds the applicant intended to rely in his application for review in the event his application for extension of time to file review was granted. Before

us the applicant admitted not to have had stated the grounds for review. However the single justice considered the grounds indicated in the notice of motion. These are;

1. The copy of judgment was served to me on 2nd November, 2011, although Delivered on 24th December, 2009 whereas 60 days prescribed had lapsed.
2. The judgment wrongly proceeded in respective findings up fact by the lower Courts where there are misdirection or non-directions and consequential misapprehension of evidence.
3. The intended review shall be strictly launched under the provisions enumerated in Rule 66(1) of the Court of Appeal Rules, 2009.
4. Thus, the delay was attributed by reasons that were over my control as, I needed a copy of judgment, to apply for a meaningful Review.

The provisions of Rule 66(1) of the Rules, above quoted, enumerate specifically five grounds an applicant can rely in an application for review. After each ground, the word "or" is indicated to show that each ground is independent. They are in the alternative, not cumulative. The single justice was thus justified to hold that:-

" It is not enough in an application for extension of time to merely state as the applicant did, in ground 3 of the Notice of Motion that " the intended review shall be strictly launched under the provisions enumerated in rule 66(1) of the Court of Appeal Rules, 2009. This is so general and cannot be accepted. The applicant was obliged to state what irregularities he intended to address in his application for review in the event his application for extension of time was granted. "

We fully associate ourselves with the findings of the single justice that the applicant was obliged to categorically state which ground or grounds he would rely on in his application for review. His failure so to do was erroneous. That apart, carefully considered, neither of

the grounds indicated by the applicant in his notice of motion fall squarely in any of the grounds set out in rule 66(1) of the Rules.

All said, like the single justice, we find no merit in the application. This reference was thus preferred without substance. It is accordingly dismissed.


DATED at DAR **ES SALAAM** 15th this day of February, 2017

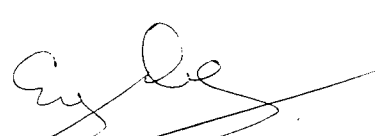
M. S. MBAROUK
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

S.A. LILA
JUSTICE OF APPEAL

I certify that this is a true copy of the original




E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL